United States Court of Appeals

for the Second Circuit

APPELLEE'S REPLY BRIEF

75-7423

To be Argued by
ROBERT P. KNAPP, JR.

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

MARY ANNE GUITAR,

Plaintiff-Appellant,

-against-

WESTINGHOUSE ELECTRIC CORPORATION, WESTINGHOUSE BROADCASTING CO., INC. (Del.), H. PAUL JEFFERS, ROBERT MARTIN CORPORATION, ROBERT WEINBERG, MARTIN BERGER, JOHN YOTTES, MARGARET MIGLIORE SCHNEIDER and GERALD DAVID LLOYD.

Defendants-Appellees.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

PLAINTIFF-APPELLANT'S REPLY BRIEF

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DOCKET NO. 75-7423

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REPLY BRIEF OF PLAINTIFF-APPELLANT MARY ANNE GUITAR

RECAPITULATION OF THE CASE

In the plaintiff's first and second causes of action, she charges that the defendants falsely and defamatorily mis-

represented the contents and subject matter of her book and accused her of hypocrisy (A-8-9). In the first cause of action, against the Martin defendants,* she also charges that the so-called "Ms. Guitar quotes" were false and defamatory (A-9-10). In both first and second causes of action, Yottes is a defendant (A-7, 11); the second cause of action, against the Westinghouse defendants, expressly alleges that Yottes was involved in the planning and programming of the Jeffers-WINS broadcast (A-12).

Paragraph 37 of the third cause of action alleges that all of the defendants acted jointly in conspiracy and collusion to defame and injure the plaintiff, that they did defame her and she was injured thereby (A-13 ¶37). The same cause of action also alleges that these selfsame acts undertaken jointly by all the defendants constituted a violation of the Communications Act of 1934 (A-14 ¶38).

The defendants' cases rest on fair comment and constitutional privilege. The defendants assert, and the court below has found, that fair comment applies to each of the statements alleged by the plaintiff to be libelous.

*The term "Martin defendants" collectively refers to Robert Martin Corporation ("Martin"), Weinberg, Berger, Yottes, Schneider and Lloyd. The "Westinghouse defendants" refers to the two Westinghouse Corporations and Jeffers.

ARGUMENT

The defendants argue that fair comment and constitutional privilege mandate summary judgment for them, but their briefs do not bear out their contentions. In three separate and independent respects, the defendants have failed to meet their burden as the moving parties. Each of these presents a material issue of fact. First, the defendants' statements were published as representations of fact, not as criticism, comment or opinion; and they are false. Second, the defendants made their false statements in implementation and consummation of a conspiracy to injure the plaintiff; and, third, they made them with knowledge of their falsity.

Throughout their papers below and in this court, the defendants have in effect adopted the posture that on their motion for summary judgment, the plaintiff has the burden of establishing its case by a preponderance of the evidence, rather than its being the defendants' burden to show the absence of any material issue of fact, with all ambiguities being resolved against the defendants and all reasonable inferences drawn in the plaintiff's favor. Heyman v. Commerce and Industry Insurance Company, No. 75-7230, slip opinion at 279 (2d Cir., filed October 24, 1975).

On the issue of conspiracy, the defendants' briefs do not even attempt to meet their burden of negating an issue of fact. Accordingly that will be treated first.

POINT I

The Issue of Fact as to Conspiracy

The plaintiff asserts that Jeffers' broadcast four days after her appearance in Irvington and three days before the leaflet's distribution at Martin's zoning hearing was the direct and intended product of a conspiracy in which Martin employed WINS "casual," Yottes, as its instrumentality to effectuate the broadcast in order that it might be used in the leaflet (P Br. 4-6, 14-16, 18-21).* To negate plaintiff's showing of a conspiracy and to demonstrate the absence of an issue of fact in that regard, defendants have responded with an explicitly particularized, step-by-step account of how Yottes through allegedly sheer blind happenstance chanced to hear Jeffers' broadcast, taped it for Martin at Berger's request and made a transcription of the tape, which, according to Berger, was copied into the leaflet. The defendants' stories rest exclusively on the credibility of the uncorroborated and unsubstantiated testimony of the defendants Jeffers, Yottes and Berger.

The defendants have had to stake their case on the allegations that Martin's leaflet "review" came into existence fortuitously and solely as the consequence of Yottes' having heard by pure chance Jeffers' broadcast (W Br. 9; M Br. 3; S Br. 3).

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*"P Br." refers to the plaintiff-appellant's brief; "W Br." to the Westinghouse brief; "M Br." to the Martin brief; "S Br." to the Migliore-Schneider-Lloyd brief. Defendant-appellee Yottes has filed no brief on this appeal.

Such a showing is critical to them because their defenses are all grounded on fair comment, and as plaintiff has demonstrated, fair comment does not apply to a false publication made solely for the purpose of causing harm (P Br. 50-53). None of the defendants has challenged the plaintiff's statement of this fundamental principle of the law of libel. What is more, although they have thus tacitly acknowledged that the conspiracy is fatal to their key defense of fair comment, none of them has attempted to question or explain away the plaintiff's categorical demonstration of the inexplicable gaps, contradictions and inconsistencies in the Berger-Yottes account of how Yottes' allegedly fortuitous listening to the Jeffers broadcast culminated in the Martin leaflet.

In arguing for affirmance of summary judgment, defendants are simply asserting that the court below was entitled to give full credibility to Berger, Yottes and Jeffers' denials of conspiracy despite the conflicts, contradictions and gaps in their testimony. Also, say the defendants, the court properly rejected and ignored the inferences most favorable to the plaintiff to be drawn from the undisputed evidence of the circumstances surrounding the broadcast and the publication of the leaflet. Defendants maintain that the wholly uncorroborated Berger-Yottes story of the source of the leaflet "review" was properly accepted by the court below as true.

As "factual" authority for Yottes' non-participation in the conspiracy, Westinghouse's brief cites two and only two affidavits (W Br. 9). First, it refers to the affidavit of Dickey, General Manager of Station WINS, who says that Yottes' "employment records . . . show that . . . he had nothing to do with the book review in question!" (A 136; exclamation point ours.)

Dickey does not even purport to state that he had any personal or other knowledge of Yottes' activities at the time of the conspiracy, and there is no evidence to show that he did. As its only other authority for Yottes' non-involvement in the conspiracy, Westinghouse cites his affidavit (W Br. 9; A-183).* Paragraph 5 of Yottes' affidavit is a blanket denial of participation in the preparation of the broadcast. As such it says no more than Yottes' denial in his answer, which merely creates an issue of fact. In ¶6 of his affidavit, Yottes tells how he allegedly happened to have heard the broadcast, subsequently taped it and transcribed the tape.

Yottes' denial that he worked with Jeffers in preparing the broadcast must be evaluated against his identical, flat and unequivocal denial that he ever at any time worked with Jeffers at WINS (D 110 p21:19).** Jeffers' testimony directly contradicts Yottes. He says that he and Yottes customarily worked with each other (P Br. 28; D 121 p82:14). Yottes' account of delivering the broadcast transcript to Berger runs directly afoul of the best evidence rule and the myriad inconsistencies and conflicts that discredit Berger's story of what he subsequently did with Yottes' alleged transcript (P Br. 24-27). No defendant has even attempted to explain what became of Yottes' purported transcript nor tried to unravel Berger's tangled and

*As originally served and filed, the Westinghouse brief cited "A 163" for Yottes' non-involvement in the conspiracy, not A 183. The first citation, A 163, referred to the affidavit of Mina, Lloyd's attorney, who had no personal knowledge of the facts, and plaintiff's reply brief responded accordingly. Westinghouse's subsequent correction of the citation to A 183 has required plaintiff to revise her reply brief.

**As in plaintiff's opening brief, "D" refers to a document number in the record but not the appendix; "p" to the page in that document, and ":" when used, to a line on that page.

wholly unsubstantiated account of how the supposed transcript found its way in a different version into the leaflet. (ibid.) Nor is it denied that Berger's account is directly contradicted by his own secretary Migliore and his own partner Weinberg.(ibid.)

Berger, Yottes and Jeffers' mere denials that they conspired are not sufficient to establish the absence of a material issue of fact. To establish conspiracy, plaintiff need not offer direct evidence of agreement among defendants.

> "But it is said that in order to show a combination or conspiracy * * * some agreement must be shown under which the concerted action is taken. It is elementary, however, that conspiracies are seldom capable of proof by direct testimony, and may be inferred from the things actually done * * *" Eastern States Retail Lumber Dealers' Association v. U. S., 234 U.S. 600, 612 (1914).

The rule that applies to this case was well set out many years ago in a prominent treatise on evidence, 3 Greenleaf, Law of Evidence (rev. ed. 1899) 122 § 93:

> "The evidence in proof of a conspiracy, will generally, from the nature of the case, be circumstantial. Though the common design is the essence of the charge, it is not necessary to prove that the defendants came together and actually agreed, in terms, to have that design, and to pursue it by common means. If it be proved that the defendants pursued by their acts the same object, often by the same means, one performing one part and another another part of the same, so as to complete it, with a view to the attainment of that same object, the Jury will be justified in the conclusion, that they were engaged in a conspiracy to effect that object."

Only very recently the same principle was stated in a case charging a Sherman Act conspiracy:

> "Thus, where agreement is alleged, a showing of parallel activity is sufficient to defeat a motion for summary judgment unless the moving party can show that its interests were divergent from

> the interests of those with whom he was alleged to have agreed and the most reasonable inference which can be drawn from his actions is innocent." Mages v. Spalding Sales Corp., 1975-2, Trade Cas. ¶60,579 at page 67540 (D.C. N.D. Ill. Nov. 11, 1975; not yet officially reported).

In the present case, there is no way that Berger, Yottes and Jeffers can show a divergence of interest. Each admittedly took part in the publication of the defamations. In moving for summary judgment, the defendants assumed the burden of showing the absence of conspiracy. The undisputed proof of their parallel activity coupled with their inability to reconcile the contradictions in their evidence cannot support the decision appealed from.

> " '[w]here the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented.' " Adickes v. S. H. Kress and Company, 398 U.S. 144, 160 (1970) (quoting the report of the Advisory Committee on the revision of Rule 56(e); emphasis, the Court's).

> "Principles applicable to summary judgment motions generally, are applicable to such motions when made in a defamation action. [Citations omitted] * * * * upon such a motion in a defamation case, as in all other actions, the court must resolve all ambiguities and draw all reasonable inferences in favor of the party opposing the motion. [Citations omitted]" Hotchner v. Castillo-Puche et al., 74 Civ. 5516, memorandum decision at 22-23 (S.D.N.Y. Nov. 12, 1975).

Yottes himself, the key conspirator, has filed no brief. The remaining defendants maintain Yottes heard Jeffers' broadcast by pure chance at 9:00 a.m. on Sunday, December 17, then at Berger's request, taped it at or about 1:00 p.m. that day, transcribed the tape and gave the transcription to Berger. Then, say the defendants, Berger caused Yottes' transcription to be reproduced in the leaflet that Berger had distributed at the zoning hearing.

The defendants' account rests solely on the uncorroborated testimony of Jeffers, Berger and Yottes, the defendants who are charged to be the instigators and principals of the conspiracy. In instance after instance without ever a single word of denial by defendants, plaintiff has shown where their testimony discloses a complete lack of credibility. Defendants do not deny that Yottes and Jeffers gave totally contradictory, mutually exclusive testimony regarding their employment relationship at WINS (P Br. 28). Nor do they deny that Jeffers displayed lack of candor and forthrightness in his quibbling and equivocating answers to questions seeking his views of plaintiff's book (P Br. 33).

If Yottes had in fact taped Jeffers' review and typed a transcription from which Berger prepared Martin's leaflet, the wording of the review and the leaflet would be identical. They are not (P Br. 7), and defendants have never advanced a word of proof to explain the discrepancies. Those discrepancies on their face brand the Berger-Yottes account a falsehood.

This prima facie evidence of the falsity of the Berger-Yottes story is reinforced by the contradictions and inconsistencies that mark every link in their chain of allegations, contradictions and inconsistencies which defendants have not attempted to explain or deny. At Berger's deposition, he produced the transcriptions that Migliore and Lloyd had allegedly made of the notes they say they took of plaintiff's remarks at the December

13 meeting, yet Yottes' alleged transcript, the only tangible evidence that possibly could, if it were authentic, independently confirm even one link in the Berger-Yottes chain, has never been produced, nor has its absence been accounted for. Nor have the defendants even as much as attempted to deny or justify a single one of the manifold contradictions and inconsistencies that riddle Berger's account of his preparation of the leaflet "review" (P Br. 19-20, 23-27).

When Berger was first asked what he had done with the purported transcript of Jeffers' broadcast that Yottes had allegedly made and delivered to him, Berger flatly disavowed any recollection of it (P Br. 24-25). Only after the forceful and pointed intervention of his attorney (A-48), who in effect summarized the Martin factual defense in capsule form, did Berger answer that he had given Yottes' alleged transcript to "somebody on the office staff." Defendants' inability to produce Yottes' alleged transcript of the broadcast confronts the trier of fact with a critical issue of credibility.

After Berger's attorney had interceded, Berger said he might have given the Yottes transcript to Migliore or one of "A number of clerks and secretaries working for me" (A-49 P Br. 25). Yet Berger's own partner, Weinberg, and Migliore herself both testified that only Migliore, and no one else, worked for Berger (P Br. 25-26), and she testified positively that she had never seen any transcript of Jeffers' broadcast until the afternoon of the zoning hearing, when it appeared in the final printed leaflet (P Br. 26). These facts, too, the defendants have not at-

tempted to explain or refute. Plaintiff has the right to read Berger's deposition in open court and to have him and Yottes tell their stories to a jury who will decide where the truth lies.

In order to make their case here, the defendants have been compelled to present and rely upon, as facts, matters that are without any foundation in the record or are themselves critical issues of fact. They repeatedly characterize Jeffers' "review" as news (W Br. 7-8), but their own witness's testimony is to the direct contrary. Dickey, the General Manager of station WINS, offered by Westinghouse as one having knowledge of the facts, testified that the "review" was "soft material," which he carefully distinguished from news. (P Br. 50; D 117 p11:14). A central issue is the untimeliness of Jeffers' virulent, Christmastide attack on the author of a six-month-old, summer book. They allege that Jeffers was a competent literary critic (W Br. 8), but also argue that the court below properly disregarded all the evidence to the contrary (W Br. 37 f.n.). The uncontradicted evidence of experts shows that Jeffers' testimony indicates that he was not a bona fide book reviewer (P Br. 30-33). They claim Jeffers alone was responsible for the "review" (W Br. 8), also that the leaflet was "a printed reproduction of the review" (W Br. 7). The first allegation is a central issue in the case; the second is untrue because there are differences in language between the two.

All of the defendants have grounded their cases on fair comment. Fair comment cannot apply to this case in any sense, and in no event can statements made pursuant to a conspiracy to injure another constitute comment (P Br. 50-51). To bring their defamatory utterances within the ambit of

fair comment defendants have "the burden of showing the absence of a genuine issue as to any material fact" concerning the plaintiff's allegations of conspiracy, and for that purpose the defendants' papers "must be viewed in the light most favorable to the" plaintiff. Adickes v. S. H. Kress and Company, supra, 398 U.S. 144, 157 (1970). The defendants have put forward nothing that overcomes the lack of credibility of the three parties on whose testimony their case depends, Berger, Yottes and Jeffers.

Plaintiff has alleged that she has been defamed as the consummation of a conspiracy for that purpose. Within a period of three days, the only three days that could serve Martin's purpose, WINS broadcast a review of her book and Martin distributed its version of the broadcast at a zoning hearing. WINS' self-proclaimed mission is "All News All The Time," but the plaintiff's summer book was already six months old at the time of the broadcast.

Defendants have claimed that the timing of the broadcast and Martin's use of it in the leaflet rest on a pure coincidence, for which the defendants have put forward a particularlized account. The discrepancies in wording between the broadcast "review" and the leaflet version demonstrate prima facie that the leaflet is not, as the defendants represent, a transcript of the broadcast. Defendants' testimony of the origin of the leaflet is unsupported by any documentary evidence as required by the best evidence rule; it is studded with contradictions and inconsistencies, which they do not explain or deny.

POINT II

The Defendants have Failed to Establish That Summary Judgment Was Properly Granted on the Basis of Fair Comment

The bulk of the defendants' argument in support of summary judgment is directed to this defense of fair comment. Westinghouse's entire Point I on the allegedly nonlibelous nature of the publications is predicated on fair comment. Point II is explicitly entitled in fair comment, and Point III on constitutional privilege again picks up the refrain of comment. The other two defendants' briefs follow the same pattern.

The defendants' reliance on fair comment is entirely misplaced for two reasons. In the first place, the defamatory publications that the plaintiff complains of are false statements of fact. It is the jury's province to determine whether a statement is fact or comment. Secondly neither the defendants nor the court below has made any effort to analyze the statements complained of and demonstrate how they constitute comment.

As the New York Court of Appeals held in Hoeppner v. Dunkirk Printing Co., 254 N.Y. 95, 105 (1930):

> "The majority of the court, however, are of the opinion that the article goes further, and may be interpreted or taken as a criticism of the plaintiff's work * * * and of his professional capacity and intelligence * * * If the words are susceptible of this meaning, it then becomes a question for the jury to say whether they were used in any such sense."

To the same effect is Foley v. Press Publishing Co., 226 App. Div. 535, 544-545 (1st Dept. 1929) and Van Arsdale v. Time, Inc., 35 N.Y.S. 2d 951 (Sup. Ct. N.Y. Co. 1942; not officially reported) affd. 265 App. Div. 919 (1942), where the court said:

> "We cannot rule as a matter of law that this article contains all facts and no comment. It is for the jury to decide what part of the article was opinion and whether it was fairly warranted by the facts. Cohalan v. New York World-Telegram Corp., 172 Misc. 1061, 1065, 16 N.Y.S. 2d 706 [Sup. Ct. N.Y. Co., 1939]" 35 N.Y.S. 2d at 954.

In the latter case it was held:

> "* * * 'It is for the jury, subject to the direction of the judge, to decide whether in the particular case the defendant's allegations are allegations of facts or expressions of opinion, and, if expressions of opinion, whether such expressions of opinion are fairly warranted by the facts truly stated or referred to.' (Gatley on Libel and Slander, [3d ed.] p. 373.)" 172 Misc. at 1065.

Although in one point after another the defendants have argued at great length that their statements are entirely comment and not fact, they and the court below make no effort to analyze or explain these wholly generalized contentions with respect to even a single passage in their publications.

Jeffers' broadcast, as it was reprinted in Martin's leaflet (A-15-17) began with the passage:

> "The hope of a lot of city dwellers is to find a place in the suburbs or the country with trees and green grass and clean air. Indeed, that 'better life' has long been part of the so-called American dream. But, as you may have

> noticed, some suburbanites are not too eager to have city folk moving in. An article in yesterday's Times describes resistance in New England to new home building."

Jeffers may or may not know what he is talking about, but his words leave no doubt that in each sentence he purports to state facts. His next sentence is equally factual in tenor, and sharply disputed by the plaintiff:

> "This suburban resistance is the subject of a book by Mary Anne Guitar, who is neither a city planner nor an architect, but rather a writer about homes and conservation."

At this point in the "review," there arises the first obvious issue of fact, an issue so pointed and inescapable that the defendants and the court below have had to ignore it. The complaint explicitly alleges that "suburban resistance" was not a subject of her book (A-12, ¶¶31, 32). This the defendants have denied (A-19, 23, 94). The subject of a book is not a question of law, but a question of fact to be answered only by reading the book.

Jeffers next passed to two further statements clearly presented as fact and intended to be so regarded:

> "Her book is PROPERTY POWER. It amounts to a handbook on how to keep others out."

In each succeeding sentence, Jeffers makes it plain that he is referring to "suburban resistance," which he has at the outset categorically stated to be "the subject of a book by Mary Anne Guitar." Each sentence reiterates the theme of "suburban resistance" and the sense of "keep the others out." See Appelbaum affidavit (A-214, ¶3). What Jeffers' "review" said next was:

"Not just the businesses which have been looking to relocate in the suburbs, but also people.

No listener who heard Jeffers' "review" could have doubted that the plaintiff's book advocated keeping businesses and people out of the suburbs. The next sentence bore out with factual particularity Jeffers' assertion that it was "a handbook:"

"Mary Anne Guitar recommends an amazing arsenal of weapons to keep the suburbs pure -- law suits, the ballot box, tax-payer petitions, and many, many other devices."

In case his listeners might have missed the theme, he then repeats it again:

"The battle cry seems to be 'keep the others out.' People become secondary to trees and space . . . especially if the people are new comers. PROPERTY POWER denounces progress even if it means decent, livable homes for people."

And again:

"PROPERTY POWER says the rose covered cottage in the country is okay for those who got there first but must be off-limits to those who now would like to breathe some of that fresh country air."

Defendants have in one sweeping generality characterized all the statements above as expressions of opinion or comment. However, the court below (A-322-324) as quoted in the Westinghouse brief (W Br. 21) did not find itself capable of arriving at the conclusion of fair comment without first stating what it saw factually as the subject matter of the book:

> "Essentially it deals with means of preventing or curbing unrestrained growth and development to the detriment of the homeowner, property owner, and community. The evils to be battled include unregulated growth in housing, population and industry. A necessary result of the implementation of land trusts, land use controls and open space programs is the unavailability of land for newcomers; in this sense the book does advocate 'keeping others out' " (A-322) 396 F. Supp. at 1051.

Though there is no validity to the court's conclusion of fact that preservation of open space and protection of the environment is equivalent to exclusion, there is an all-important and legally critical difference in the relationship of its presentation of the book's subject to its concluding comment, on the one hand, and Jeffers' reiteration of the single theme, "Keep the others out," on the other hand. The court has done what Jeffers did not. Before its final characterization of the book, which is wholly inaccurate, says plaintiff, the court does state in its first two sentences something of the book's subject matter. Such a statement is prerequisite for fair comment. Foley v. Press Publishing Co., supra, 226 App. Div. 535, 544-545 (1st Dept. 1929). There the court held that words may be found to be comment if, and only if, placed in the context of "facts truly stated or referred to."

As painstakingly analyzed in Foley v. Press Publishing Co., supra, 226 App. Div. 535 (1st Dept. 1929), on which the defendants rely, it is of the essence of fair comment that it be based on facts truly stated. The court expressly points out

that a statement which would constitute fair comment when linked to a truthful statement of fact "is a defamatory allegation of fact" unless linked to a truthful statement. 226 App. Div. at 545. As the court held:

> "The purport of the plea [of fair comment] is, that all the facts stated in the alleged libel are true, that there remains in the libel over and above all statements of fact certain expressions of opinion, which standing alone would be libelous, but that these expressions of opinion when related to the facts proved were fair comment and that, therefore, the expression of opinion was as fully justified as the statement of fact." 226 App. Div. at 543. (Emphasis added).

The plaintiff denies that the "review" truly states fact with respect to the subject of her book. Further she asserts that there can be no question that each passage quoted on pages 14-16 above was presented by Jeffers as his statement of fact as to the content and subject of her book. Defendants, on the other hand, argue that every single mention of the plaintiff's book is not fact but comment, criticism or opinion and that the "review," therefore, does not in referring to the book make a single statement of fact. Defendants have thereby impaled themselves on both horns of a dilemma. If the plaintiff is correct, as she is, and Jeffers' statements are all purported statements of fact, their falsity is then an issue of fact that must go to the jury. If the defendants are correct, and they are not, in saying that every one of Jeffers' statements are comment, they cannot be fair comment because, as the court held in Foley v. Press Publishing Co., supra,

for a publication to constitute fair comment, it must be "based on facts truly stated." The defendants, however, insist again and again without exception that they have stated no facts, only comment. Comment says the court in Foley, must be

> "free from imputations of corrupt or dishonorable motives on the part of the person whose conduct is criticised, save in so far as such imputations are warranted by the facts truly stated and (4) the honest expression of the writer's real opinion." 226 App. Div. at 544. (Emphasis added).

Again at 226 App. Div. at 547, the court repeats the necessity that fair comment must be "an inference which a fair-minded man might reasonably draw from the facts truly stated and represent the honest opinion of the writer." (Emphasis added). Here the defendants expressly insist that they have stated no facts, true or otherwise. Whether the defendants' words are measured by their plain meaning or by the standards so clearly enunciated in Foley, they constitute statements of fact.

The subject matter and content of a book is a matter of fact. Jeffers says "This suburban resistance is the subject of a book by" plaintiff. That is his only explicit and categorical statement of the book's subject and content, and the complaint expressly alleges that "suburban resistance" is not her book's subject (A 12 ¶32). The passages quoted and analyzed above are paraphrased iterations and reiterations of Jeffers' false, explicit

representation that the book's subject is "suburban resistance." Implicit in "keep others out," "keep the suburbs pure, " ' keep the others out,'" "People become secondary * * * especially * * * newcomers," "denounces progress" and "off limits" is the misrepresentation that the book's topic is "resistance . . . to new home building," the "suburban resistance" expressly stated at the outset of the "review." The "review's" listeners and readers could understand only that it stated as fact that plaintiff advocated "suburban resistance to new home building" and that was "the subject of [her] book" (A-15-17).

The court below chose and quoted nine passages from the plaintiff's 282-page book to justify Jeffers' statements (A-322). In taking nine passages out of context, the court has made a finding of fact without foundation in the record. The defendants have consistently argued that all of the "review's" statements were comments, not facts. Nowhere in the defendants' motion papers or the "review" is there any mention of any passage quoted by the court. Plaintiff denies that the nine passages support Jeffers' misstatements. She has cited twenty-three passages as truly indicative of her book's subject (P Br. 41). But it was the entire book that Jeffers misrepresented as "a blueprint for stagnation in the suburbs." The content and subject matter of the book as a whole present a central issue of fact, which the court below has erroneously purported to resolve in granting summary judgment.

Hypocrisy

None of the defendants has attempted to deny that "hypocrisy" is by its very definition a personal and human quality

or attribute, which cannot be applied to a book or an inanimate object. Westinghouse's attempt to emphasize "it" in the phrase "the seeming hypocrisy of it" ignores and avoids the context in which that phrase appears. As noted in the plaintiff's initial brief, after the broadcast's introduction, forty per cent of its text is directed at the plaintiff personally. The "review" could have left no doubt in the minds of any who heard or read it that the alleged "hypocrisy" was attributed to the plaintiff personally. The entire passage in which "hypocrisy" appears is as follows:

> "What bothers me about PROPERTY POWER is the seeming hypocrisy of it. On one hand the author writes, 'most of us simply want to live on the land.' Then she proceeds to write a book telling how to keep 'most of us' from doing so." (A-16)

The hypocrisy that Jeffers refers to is too obvious to require explanation.

In this respect the doctrine of fair comment as developed in the Foley case, supra, is directly applicable, and Westinghouse's purported concern for "the curtailment of all literary criticism" (W Br. 15) reflects either an unfamiliarity with that doctrine or an intentional blindness to it. Foley places no limitations on characterizations such as "hypocrisy" provided they are based on "facts truly stated." 226 App. Div. at 543-547. Here the plaintiff charges that she has been falsely accused of writing "a book telling how to keep 'most of us' from [living on the land]" (P Br. 7). This, again, is the same issue

of fact, the subject of the plaintiff's book. That, says Foley, is a question for the jury. 226 App. Div. at 546-547.

The Misrepresentation
of the Book's Title

The Westinghouse and Migliore-Lloyd briefs attempt no showing of the absence of a material issue of fact as to Jeffers' misstatement of the title of plaintiff's book. He refers to it only as "Property Power" rather than by its full title, Property Power How to Keep the Bulldozer, the Power Line, and the Highwaymen Away From Your Door. Martin, however, adopts the district court view (M Br. 11), which, we respectfully submit, is a pure finding of fact and not in accord with common knowledge, nor a fortiori, the knowledge that a book reviewer should have. The court notes that on the slip cover, the words "Property Power" alone appear on the spine and inside flaps and also on the spine of the book itself, while the full title is printed on the title page, the page facing the title page and most importantly, on the front of the slip cover, but then the court concludes as a finding of fact (A-316, f.n. 7):

> ". . .[I]t is unreasonable to assume that any reader would or should look further than the book cover, jacket or title page to discover the true title." (Emphasis added).

This conclusion is inaccurate, immaterial and erroneous. It is inaccurate because the front cover of the book proper is blank, because the front of the slip cover does give the

full title of the book and because the title page also gives the full title of the book. In fact it would seem to be axiomatic that the title of a book is to be found on the title page.

Where "any reader would or should look" for a book's title is immaterial to this case. Jeffers holds himself out as a book reviewer, not as "any reader," and the complaint alleges that the broadcast deliberately abbreviated the book's full title to "Property Power" to further the impression of the plaintiff's allegedly exclusionary views and to conceal from the listeners and readers of the "review" the true scope and nature of the book.

Had Jeffers' broadcast disclosed the full title of the plaintiff's book, Property Power: How to Keep the Bulldozer, The Power Line, and the Highwaymen Away from Your Door, the "review's" listeners and readers would have been put on full and immediate notice that the book's subject was not "suburban resistance to new home building" nor how "to keep others out." Only by concealing the book's true title could the defamation and disparagement of the plaintiff be effectively carried out. The "review's" object was to present the plaintiff to the Town Board and people of Greenburgh as a callous misanthrope who counseled selfishness and exclusion. Mention of bulldozers, power lines and highways would have revealed the plaintiff's true concern with the broader conservation, ecological and environmental values

that affect the nation as a whole and have long been made public policy by state and federal legislation.

The plaintiff's book accepts growth and homebuilding as premises. As the court below, but not the "review," recognized, it calls for planning and regulation of every aspect of growth that affects the natural environment. Only by deliberately never referring to the book by its full and proper title and by not disclosing its true subject matter, was it possible for the "review" to present the book and the plaintiff as advocates of "keeping others out."

Here again the court below was confronted with a clear-cut issue of fact. The defendants do not claim that Jeffers' representation of the book's title should be deemed fair comment. It is an issue of fact. In finding that the book's proper title was "Property Power" the court transgressed on the province of the jury.

The "Ms. Guitar quotes"

The defendants and the court below have attempted to "paper over" the "Ms. Guitar quotes" (A-18) with only the broadest generalities, avoiding anything more than wholly conclusory and cursory analysis of them (A-318-320; M Br. 9, 17; S Br. 7, 11). The plaintiff has categorically asserted as to the first two "Ms. Guitar quotes:"

> "The plaintiff has never made any statement remotely like either of these, and neither

> the defendants nor the court below has shown that she did." (P Br. 10).

Further she has categorically stated that defendants have never at any time shown that she ever uttered the expressions "preserve your wooded boundaries," "keep all newcomers out at all costs," and "made to stay," which are contained in the first two "Ms. Guitar quotes" (P Br. 42). Nowhere in their briefs have the defendants denied these categorical assertions by the plaintiff. What they do now instead is to make an argument (M Br. 9, 17; S Br. 7, 12) that implies, without actually saying so, that Berger excerpted the "Ms. Guitar quotes" from Migliore and Lloyd's transcripts of the plaintiff's remarks at the December 13 "Save Irvington" meeting. (A-233-239).

There is nothing in Migliore's or Lloyd's transcripts that supports any of the "Ms. Guitar quotes," and at no point now or previously have the defendants ever shown that there was. In fact, the plaintiff, not the defendants, submitted the Migliore and Lloyd transcripts of the December 13 meeting in opposition to defendants' motions for the express purpose of showing that there was no factual basis for the "Ms. Guitar quotes" (A-204-205, ¶¶31-32). Accordingly there is no basis for defendants' argument that plaintiff must show what she did say on December 13 if she is to establish an issue of fact. On this point, as on all others, defendants have the burden of showing the absence of an issue of fact. There is no evidence of any kind to show that any of the "Ms. Guitar quotes" represent plaintiff's remarks at the December 13 meeting. Neither in Lloyd's nor Migliore's notes nor in anything else have the defendants shown a basis in fact for their

representing these as quotations of statements ever made by the plaintiff. The third "quote" was contrived by tampering with and distorting a sentence plaintiff had written in Mademoiselle magazine, and quite surprisingly the defendants themselves quote the very same material that the plaintiff uses to show the conclusive proof of distortion (P Br. 10; S Br. 4).

The court below found that the " 'quotes' addition" by Martin to its version of the broadcast "presents some difficulty" (A-318). So, too, does the omission of material language from the authority relied upon for the proposition that false quotation of the plaintiff's words constitutes fair comment. The passage quoted by the defendants and the District Court (M Br. 9; A-320) is set forth below with the material words bracketed that both the court and the defendants omitted from their quotations:

> "And a fair and true report admits of some liberality; the exact words of every proceeding need not be given if the substance be substantially stated. [True also is it that [the action of such public officials, and the [delay in the collection of taxes, are matters [about which a paper, either in its news items [or editorially, may make comments as long as [they are fair and just. (Hoeppner v. Dunkirk [Printing Co., 254 N.Y. 95.) A comment is fair [when it is based on facts truly stated and free [from imputations of corrupt or dishonorable mo-[tives on the part of the person whose conduct is [criticized, and is an honest expression of the [writer's real opinion or belief.] Mere exaggeration, slight irony or wit, or all those delightful touches of style which go to make an article readable, do not push beyond the limitations of

> fair comment. Facts do not cease to be facts because they are mixed with the fair and expectant comment of the story teller, who adds to the recital a little touch by his piquant pen." Briarcliff Lodge Hotel v. Citizen-Sentinel Publishers, Inc., 260 N.Y. 106, 118-119 (1932). (Emphasis added).

There is no support in Briarcliff for the type of gross and groundless misquotation and distortion found in the "Ms. Guitar quotes." The defendants' and the District Court's justification for those misquotations is itself supported by a misquotation. The New York Court of Appeals held that exaggeration, irony, wit and touches of style constitute fair comment, but prior to that it distinguished sharply between the reporting of the substance of a proceeding and fair comment.

> "True also is it that the action . . . and the delay . . . are matters about which a paper may make comments * * * 260 N.Y. at 118" (Emphasis added).

The court did not suggest that the false attribution of quotation constituted fair comment.

POINT III

The Constitutional Defense

The constitutional concept of "actual malice" under New York Times v. Sullivan, 376 U.S. 254 (1964) and its progeny exists only where there has been a showing that a defendant has made a defamatory statement "with knowledge that [it] was false or with reckless disregard of whether it was false or not." Cantrell v. Forest City Publishing Co., 419 U.S. 245, 251 (1974). The invocation of the New York Times defense thus premises the defendants' having made a false statement, and the defendants' constitutional and fair comment defenses are, therefore, mutually exclusive since the former rests on falsehood and the latter on "facts truly stated," as set forth in Point II. Accordingly defendants' constitutional defense does not embrace comment, but rests squarely on the premise that their publications may be found to be false.

There would seem to be only two rational explanations for a false and defamatory misrepresentation of the subject of a book by a defendant who has read the book, as both Jeffers and Berger claim to have. Either he misunderstood the book, or his misrepresentation was intentional, deliberate and malicious. But defendants do not claim to have misunderstood the content and subject of plaintiff's book. On the contrary, in support of their defense of fair comment they have vehemently asserted

under oath that their representations of the book's contents are correct and accurate. Plaintiff says they are false and that there is no factual basis for application of the constitutional privilege because defendants had the book's content and subject before them in the book itself. By their sworn testimony as to their reading and understanding the plaintiff's book, their defamatory misrepresentation of its subject could have been made only with knowledge of its falsity or in reckless disregard of whether it was false or not. Montandon v. Triangle Publications, Inc., 45 Cal. App. 3d 938, 120 Cal. Rptr. 186 (Ct. App. 1st Dist. 2d Div. 1975), cert. denied 44 L.W. 3225 (Oct. 14, 1975). Sprouse v. Clay Communication, Inc., W. Va. , 211 S.E. 2d 674, cert. denied 44 L.W. 3192 (Oct. 7, 1975).

Furthermore, this is a motion for summary judgment. To prevail defendants must "show that there is no genuine issue as to any material fact." Rule 56(c). When they assert fair comment and constitutional privilege, defendants are "talking out of both sides of their mouths." When they argue fair comment, they urge that their otherwise defamatory utterances rest on "facts truly stated." When they argue the necessity of plaintiff's showing of actual malice, they acknowledge their facts may be false and invoke privilege for their falsity. In doing so, they concede of necessity that at the very least, there may be a genuine issue of fact.

This case is not here on a question of pleading, where factually inconsistent defenses are permissible. To prevail, the defendants must show what the facts are and that there is no

genuine issue as to them. In summary judgment, there is no room for "maybes" and probabilities. Those are for the jury to weigh on admissible evidence. Defendants' arguments of fair comment and constitutional privilege rest on contradictory states of fact, truth and falsehood. Accordingly they acknowledge that a genuine issue of fact does exist.

Defendants' argument on constitutional privilege contains another and most significant, albeit inadvertant acknowledgment that there is indeed a genuine and critical issue on a central and material fact. In arguing that plaintiff is a public figure, defendants refer to "the public issues which she discussed in her book." (W Br. 30). There could hardly be a more conclusive acknowledgment of the falsity of the "review" and the falsity of the fair comment defense. There is no indication in the "review" that plaintiff's book discusses any issue, let alone "issues." The "review" and the fair comment defense says plaintiff's book is in effect a tract or polemic with the single subject of "suburban resistance" to "new home building" and the single theme of "keep the others out" (A-15-16).

Defendants argue that "since the constitutional privilege applies" plaintiff has the burden of showing that there is an issue as to "actual malice" (W Br. 33). There is no authority for defendants' position, and defendants cite none for it. In every motion for summary judgment, it is the moving party who has the burden of showing the absence of an issue of material fact

(P Br. 55-58; pp 7-8 supra). The cases cited by defendants here (W Br. 33-34; S Br. 10-11) were with one exception distinguished in plaintiff's opening brief (P Br. 59-60), and defendants have made no response to the distinctions. In the one exception, United Medical Laboratories v. Columbia Broadcasting System, 404 F. 2d 706 (9th Cir. 1968) cert. denied 394 U.S. 921 (1969) plaintiff was not even named in the alleged defamation, and Oregon, where plaintiff was located, was specified as not within the area to which the utterance applied. 404 F. 2d at 707. If defendants are to meet their burden of negating a publication made with knowledge of falsity or reckless disregard of the truth, they must first show how it is possible even negligently for a "review" to misrepresent the subject of a book. Then they must show that they did not become "a participant in a scheme or plan, the object of which was to employ grossly exaggerated and untrue assertions." Sprouse v. Clay Communication, Inc., supra, W. Va. , 211 S.E. 2d 674, 691, cert. denied 44 L.W. 3192 (Oct. 7, 1975).

Defendant Broadcasting categorically stated by its General Manager, Dickey, on his deposition that the "review" was not "a controversial issue of public importance" (P Br. 52). Now in a lengthy footnote (W Br. 32) defendants argue that to Dickey's express and affirmative statement a highly technical legal meaning must be attached. Defendants have advanced no

evidence for their argument. Their attorneys were present at Dickey's deposition and had every opportunity to cross-examine him to clarify his meaning if it was in doubt. They did not do so. If there is now a question as to what he meant, it is a question of fact for the jury.

In seeking to show plaintiff to be a public figure, defendants compare her to Norman F. Dacey, controversial author of How to Avoid Probate (W Br. 31). They do not explain why if plaintiff enjoyed Dacey's fame (or notoriety) nearly half of the body of the "review" was devoted to plaintiff personally and describing her background, beginning with her birth in Missouri (P Br. 6-7, 9). A public figure needs little or no introduction.

POINT IV

Plaintiff's Federal
Statutory Rights

In Cort v. Ash, U.S. , 95 S. Ct. 2080 (1975) the Supreme Court has enunciated the factors that determine "whether a private remedy is implicit in a statute not expressly providing one." 95 S. Ct. at 2087. Examination of those factors vis-a-vis the plaintiff here demonstrates that she has a right under the Communications Act of 1934.

" is the plaintiff 'one of the class for whose especial benefit the statute was enacted.' " On its face the statute is

directed at the practice of radio and television stations broadcasting apparently as news or editorial matter what is in fact advertising. Plainly the Act was for the benefit of those who would be injured by having their competitors apparently endorsed purely as a matter of disinterested conviction or public service by a radio station when in fact the broadcast was disguised advertising. Plaintiff's book was in competition with all the other books in the marketplace. To have it and herself condemned by WINS was to injure her even more than would a "plug" for a competitor's book. As its second factor, the Supreme Court stated "is there any indication of the legislative intent, explicit or implicit, either to create such a remedy or to deny one?" This point has been covered by the discussion of case law set forth at pages 64-69 of the plaintiff's initial brief in this appeal. The same applies to the third factor as defined in Cort v. Ash, "is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?"

As its fourth and final factor, the Supreme Court asks "is the cause of action one traditionally relegated to state law in an area basically the concern of the State's so that it would be inappropriate to infer a cause of action based solely on federal law?" 95 S. Ct. at 2088. The field of broadcasting has of course been preempted by the federal government from almost its inception. There is not and cannot be a state remedy for broadcast advertising disguised as editorial or news matter. The

"review" was broadcast to advance Martin by injuring the plaintiff. Title 47 U.S.C. §317 goes far beyond the traditional limits of libel. It creates the right not to be injured by disguised advertising broadcast as if it were news or fair comment. The injury occurs when the matter is broadcast without announcement of its sponsor's name.

The "review" is harshly and wholly condemnatory of plaintiff and her book. If there had been included in it, as the Act requires, the announcement that Martin had sponsored it, a listener would have known that it was not the independent statement of WINS but of someone with a reason to attack the plaintiff. The force and injury of the "review's" condemnation is aggravated and intensified, as Martin intended it should be, by its falsely seeming to be the spontaneous, unbiased utterance of Jeffers as WINS's literary critic. Apart from all other considerations, this violation of the Communications Act injured the plaintiff. In view of the unlimited latitude that WINS irresponsibly gave Jeffers in broadcasting material without review or supervision (P Br. 13), a private right of action is essential to effectuate the Act's purpose of preventing misuse of the broadcast medium. Had Martin been compelled to disclose its sponsorship, as the law requires, there would have been no "review."

POINT V

Jeffers

Plaintiff denies every item of Jeffers' defense on material issue of fact other than his statement that he made the tape that was broadcast as his "review" (P Br. 28-34). She denies that Jeffers ever bought her book, and Jeffers is unable to

say where or when he bought it (P Br. 32). She denies he ever wrote the review, and Jeffers has produced no writing to show he did. In these matters, as throughout its decision, the Court below has determined issues of fact against plaintiff with no evidence cited to support its findings. When the Court below termed as "egregious," plaintiff's evidence of Jeffers' lack of credentials as a bona fide book reviewer and her evidence that his "review" of her book was completely contrary to all his past practice, these were further unwarranted findings of fact based entirely on the Court's own convictions and directly contrary to plaintiff's evidence, which is undenied.

C O N C L U S I O N

On all of the foregoing, the decision appealed from should be reversed and the case remanded to the United States District Court for trial.

Respectfully submitted,

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STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

GREGORY GROVE , being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 343 E. 30th St.; New York, N.Y. That on the 5th day of January, 1976, deponent served the within Plaintiff-Appellants Reply Brief upon Cerchiara & Cerchiara, attorneys for Defendant-Appellee Yottes at the address designated by them as follows:

Cerchiara & Cerchiara, Esqs.
Attorneys for Defendant-Appellee Yottes
145 Mount Vernon Avenue
Mount Vernon, New York 10550

by depositing two true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Gregory Grove

Sworn to before me this
5th day of January, 1976.

Bernice Becker

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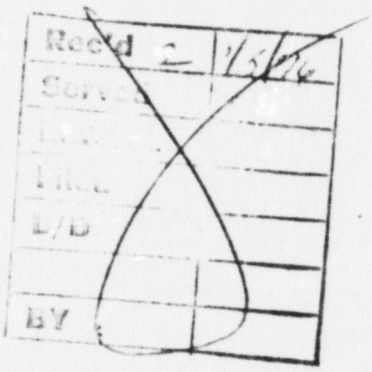
No. 24-5233505
Qualified in Kings County
Cert. filed in New York County
Commission Expires March 30, 1976



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